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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

Cause No. 53499-1-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

KEITH L. NASH
Appellant - Plaintiff

VS.

CHUCK ATKINS et al.,
Appellee's - Defendant's

APPEAL FROM CLARK COUNTY SUPERIOR COURT
CIVIL ACTION FINAL JUDGMENT

Cause No. 18-2-01598-1
15-2-02580-9

APPELLANT'S REPLY BRIEF

Pursuant to (RAP) 10.2, 10.3 and 10.4

RESPECTFULLY SUBMITTED

BY THE APPELLANT:

Keith L. Nash

Keith L. Nash Doc #769885 H-3 RM-30
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

KEITH L. NASH

Appellant - Plaintiff

VS.

CHUCK ATKINS et al.,

Appellee - Defendants

Cause No. 53499-1-II

APPELLANT'S TIMELY REPLY

BRIEF. Pursuant to (RAP)
10.2, 10.3 and 10.4.

I.

IDENTITY OF PARTY :

Comes Now, the appellant Keith L. NASH, appearing pro-se, and files this timely reply brief pursuant to (RAP) 10.2, 10.3 and 10.4.

II.

REPLY :

Appellant Nash files this timely reply brief to lodge any and all objections to the appellee's response brief as his rebuttal that may establish a genuine dispute of material facts which exists that may demonstrate contrary to respondent's response in order for this reviewing court to overrule respondent's arguments submitted within their response brief. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); see T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F2d 626, 630 (9th Cir. 1987); see (RAP) 10.2, 10.3 and 10.4.

First, respondents have clearly waived their rights to address appellant's opening brief claims in challenging the alleged claims raised on whether the claims raised are ripe for review for this court. See State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010).

To determine whether a claim is ripe, a court must examine the fitness of the issues for judicial determination and the hardship to the parties that withholding determination would cause. See Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). On Review, issues are fit for judicial determination when three requirements are met: (1) the issues raised are primarily legal, (2) the issues raised do not require further factual development, and (3) the challenged action is final. See Sanchez Valencia, 169 Wn.2d at 786 (quoting State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)). Therefore, appellant claims revolves decisions of the superior court that may be appealed pursuant to (RAP) 2.2(a)(1), (3), (9), (12) and (13). See In re Det. of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999).

Nor, have the appellee's objected to oppose that the appellant is the 'aggrieved party' pursuant to (RAP) 3.01g which provides that 'only an aggrieved party may seek review by the appellate court.' "An aggrieved party must have a present substantial interest in the subject matter of the appeal and must be aggrieved 'in a legal sense.' See State v. Mahone, 98 Wn.App. 342, 347-48, 989 P.2d 583 (1999) (quoting State ex rel. Simeon v. Superior Court, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944)). The aggrieved party's personal right or pecuniary interests must have been affected. See State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605 (2003); see also Me? trova v. Dep't of Labor & Indus., 142 Wn.App. 693, 704, 176 P.3d 536 (2008) (defining 'aggrieved' as 'a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation' (internal quotation marks omitted))

Here, respondent's response alleges that appellant's complaint stem from incidents that occurred while he was incarcerated in the Clark County Jail in 2015. CP-26-39. Specifically, he claims the respondents would not allow Appellant to use

the County's phone or fax to contact his financial institution. CP 36. He claimed the respondents were negligent and caused him emotional and mental distress. Id. (see respondent's response brief pgs 5 footnote). However respondent's failed to mention OR object to on what the complaint has alleged [ie] declaratory relief section : stating "Reimbursement of his stolen funds" and injunctive Relief section : "to compensate plaintiff's stolen funds of an estimated net amount of \$ 15,000 dollars for their causation and participation to infringe, impede plaintiff's ability to be reimburse by his financial banking institution arising from criminal actions against plaintiff." Therefore, this reviewing court should consider whether appellant's stolen funds incurred an estimated amount of \$ 15,000 dollars constitute's a legally injury as established in case Sheets v. Benevolent & Protective Order of Kesters, 34 Wn.2d 851, 855, 210 P.2d 690 (1949). If so, then appellant appeal is appropriate for review by this Reviewing court. See (RAP 301).

Secondly, respondents have lodged there objections to issues primarily to : A) Whether appellant's claims are barred by the three year statute of limitations; B) When the trial court's decision to dismiss appellant's claims was proper, reasonable, well within the applicable law, and based on evidence submitted in the complaint, precluding reconsideration; C) Whether the trial court properly exercised discretion in denying appellant's other motions regarding service of the complaint. (See respondent's response table of contents i).

As to respondent's first lodge objection on whether the claims are barred by the three year statute of limitations pursuant to (RCW)4.16.080(2); see Washington v. Boeing Co., 105 Wn. App. 1, 19 P.3d 1041 (2000). No where on the record did respondent's ever dispute that the appellant Nash failed to

properly exhaust all available remedies such as the filing of the Clark County Tort claim within the prescribed three year statute of limitations pursuant to (RCW) 4.16.080(2). See Antonius v. King County, 153 Wn.2d 256, 261-262, 103 P.3d 729 (2004). Chapter (RCW) 4.16.170 tolls the statute of limitations actions, when deemed commenced or not commenced.

At no time did the trial court applied any of the tolling of the statute of limitations when appellant Nash demonstrated excusable negligence when the court dismissed the initial cause action without prejudice, see cause No. 15-2-02580-9 in order to allow appellant to properly exhaust his claims for damages by properly filing a county tort action. See Superior Court Case Summary docket report status pgs -2 DKT's

As this reviewing court has previously held the doctrine of equitable tolling may apply and extend a statutory deadline if the plaintiff can show that the delay was caused by the defendant's "bad faith, deception, or false assurances and the exercise of diligence by the plaintiff." See Millay v. Camp, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Courts apply the doctrine sparingly, and it does not apply to cases of "garden variety" excusable neglect. See City of Bellevue v. Benyaminov, 144 Wn. App. 751, 761, 183 P.3d 1127 (2008); see also State v. Duvall, 86 Wn. App. 871, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012 (1998). Here, this reviewing court may review the record in whole contents on whether appellant Nash has clearly demonstrated a show of delay was caused by the proximity actions of other individuals or party. Appellant Nash claims circumstances in which the trial court failed to apply any equitable tolling regarding to the three year statute of limitations pursuant to (RCW) 4.16.080 (2).

A) Appellant should have had equitable tolling applied when the trial court granted the Voluntary Motion to Dismiss on January 20th, 2017, in cause no. 152-02580-9 see DKT# 32;

B) Appellant should have had equitable tolling applied when the trial court failed to provide appellant with a new cause of action when appellant refiled the civil complaint and on August 2nd, 2018, the court commenced the action under a new cause number 18-2-01598-1;

C) Appellant should have had equitable tolling applied when various motions [ie] motion for extension of time; motion for process of services were filed with the court and appellant was in a delay on awaiting the outcome of the court's decisions on the pleadings. See Cause number 18-2-01598-1 Summary report DKT # 7, #19, #20, #23, #30; see

also Court of Appeals Index Section Sub# 25 No. pgS-2 Pg No. 100; Sub# 6 No. pgS-2 Pg No. 41; Sub# 19 No. pgS-2 Pg No. 86; Sub# 7 No. pgS-18 Pg No. 43; Sub# 20 No. pgS-6 Pg No. 88; Sub# 55 No. pgS-2 Pg No. 191; Sub# 15 No. pgS-2 Pg No. 23; Sub# 40 No. pgS-3 Pg No. 23; Sub# 24 No. pgS-3 Pg No. 97.

If so, then this reviewing court may consider whether the error may constitute as an actual and substantial prejudice that constitutes a fundamental defect which inherently results in a complete miscarriage of justice. See In re Pers. Restraint of Cook, 114 Wn. 2d 802, 810-12, 792 P.2d 506 (1990) (quoting Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed. 2d 417 (1962)). Therefore, it should appear to this reviewing court from the record that appellant Nash has demonstrated due diligence in the commencement of the civil action within the three year statute of limitations which extraordinary circumstances beyond his control caused the lapse of the filing and service process within the three year statute of limitations. Thus, this court has discretion and authority to reverse the trial court decision and remand

in part this case back to the trial court for further proceedings on this specific issue or claim raised upon direct review.

As to respondents second lodged objection on when the trial court's decision to dismiss appellant's claims was proper, reasonable, well within the applicable law, and based on evidence submitted in the complaint, precluding reconsideration. (See Respondent's Response Table of Contents;).

This reviewing court reviews CR 12(b)(6) dismissal de novo. See Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) see also "Future Select Portfolio Mgmt. Inc. v. Tremont Grp. Holdings, Inc.", 180 Wn.2d 954, 962, 331 P.3d 29 (2014).

Dismissal is appropriate under CR 12(b)(6) only if the plaintiff cannot prove 'any set of facts which would justify recovery'. Id. See Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922 n.9, 296 P.3d 860 (2013).

Respondents argues that dismissal is appropriate based upon appellant's failure to commence the lawsuit within the applicable statute of limitations. (See Respondent's Response pg 5-7).

However, Respondents waived any rights to object that appellant's complaint may appear to establish that all facts alleged in the complaint are true. See Tenore v. AT&T Wireless Services, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

Thus, the superior court makes the initial sufficiency determination, subject to review by this court. See In re Recall of Kast, 144 Wn.2d 807, 813, 31 P.3d 677 (2001) (citing In re Recall of Beasley, 128 Wn.2d 419, 427, 908 P.2d 878 (1996)).

In addition, a trial court's denial of motion for reconsideration under CR 59 for abuse of discretion. See Brannon Grp. v. Jefferson County, 159 Wn. App. 466, 485, 245 P.3d 789 (2011); also reviews a trial courts conclusion of law de novo. See Sottero v. Wimer, 159 Wn.2d 428, 433, 150 P.3d 552 (2007).

In reviewing appellant's dismissal under CR 12(b)(6) and appellant's timely filed motion for reconsideration pursuant to CR 59 this court has discretion to determine whether

appellant Nash has clearly demonstrated that he has indeed established 'substantial evidence' to properly withstand a motion to dismiss pursuant to CR 12(b)(6) and whether the CR 59 motion for reconsideration denial was an error that is contrary to law. See In re Estate of Jones, 152 Wn.2d 1, 8, [162 Wn.2d 353] 93 P.3d 147 (2004); see Dumas v. Gignee, 137 Wn.2d 268, 280, 971 P.2d 17 (1999).

If so, then appellant Nash properly asks this reviewing court to determine whether the trial court to properly applied the law by the interpretation of the statute of limitations pursuant to (RCW) 4.16.080 to timely commence a civil action within the prescribed three years limitations to be entitled to equitable tolling pursuant to (RCW) 4.16.170.

Secondly, to properly ask this reviewing court on whether appellant Nash met the process and service requirements pursuant to (RCW) 4.28.080 when service was commenced upon the Clark County Auditor when the complaint alleged in his individual capacity and official capacity. See Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash. App. 386 (quoting Hafner v. Meto, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)).

Accordingly, to respondent's second lodge objections appellant asks this reviewing court if determined that the trial court missapplied the law in failing to provide equitable tolling to the three year statute of limitations.

Then the appropriate remedy in order to prevent any prejudice is to REVERSE and REMAND this issue back to the superior court for further proceedings.

Finally, Respondent's last objections in opposing to appellant's claims that the motions [ie] motion for indigency; motion for process and services; and the motion for extension of time.

It should appear to this reviewing court that these motions would be review under the harmless analysis. See State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005) (alteration in original) (quoting State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002)).

Therefore, even applying the standard of review of the harmless error analysis, this court may determine on whether the error is prejudicial that may appear to impacted the appellant's action and caused final judgment in favor of defendant's CR 12(b)(6) motion. See Strikes Woods Neish Ass'n v. City of Lacey, 124 Wn.2d 459, 466, 880 P.2d 25 (1994) (stating that CR 6(a) expressly supersedes (RCW) 1.12.040 'when a procedural right is involved').

Accordingly, in light of appellant's reply brief in Rebuttal to respondents response on their third objection opposing appellant's claims concerning various motions which the trial court denied. This reviewing court may if determine that the errors constitute's as either under the harmless analysis if the error is prejudicial may reverse and remand this case back to the trial court for further proceedings.

III.

CONCLUSION:

Wherefore, appellant Nash asks respectfully for this reviewing court to apply the appropriate relief to Overrule respondent's response brief and to provide relief and reverse and remand this case back to the superior court for further proceedings in the of justice.

RESPECTFULLY SUBMITTED,
BY THE APPELLANT

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DECLARATION OF SERVICE BY MAIL

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STATE OF WASHINGTON
BY

I, KEITH L. NASH, declare and say:
That on the 16th day of February, 2020, I deposited the
following documents in the Stafford Creek Correction Center Legal Mail system, by First
Class Mail pre-paid postage, under cause No. 534 99-1-II:

'One Original Reply Brief';

addressed to the following:

Clerk: Derek M. Byrne
Case Manager: Debbie
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Clark County Prosecutor's Office
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I declare under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

DATED THIS 16th day of February, 2020, in the City of
Aberdeen, County of Grays Harbor, State of Washington.

Keith L. Nash
Signature

KEITH L. NASH
Print Name

DOC 769885 UNIT H-3 RM-30
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